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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 161 .

GUSTAV MACHATY,

Petitioner,

—against—

ASTRA PICTURES, INC., MICHAEL M. WYNGATE, INC., MARTIN LICHT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY PFARLMAN,
Counsel for Petitioner,
1440 Broadway,
New York, New York.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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No. .

GUSTAV MACHATY,

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—against—

ASTRA PICTURES, INC., MICHAEL M. WYNGATE, INC., MARTIN LICHT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner Gustav Machaty prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause on the 28th day of March, 1952.

STATEMENT.

This suit was brought by the petitioner, who is the author and producer of the motion picture film entitled "Ecstacy", against the respondents, to restrain them from infringing upon said film, and for an accounting and damages.

Outline of the Case and Questions Presented.

The petitioner Gustav Machaty, of Czechoslovakia, wrote, directed and produced in 1931 and 1932 a film entitled "Ecstacy", featuring the actress by the name of Hedy Kiesler (now known as Hedy Lamarr).

On July 12, 1932, the petitioner, Gustav Machaty, as the author and producer of said film, entered into a contract with Elekta-Film, a Czechoslovakian corporation, for the distribution by the latter of said film, throughout the world, upon the payment of certain royalties by the Elekta to the petitioner.

Thereafter, and in 1934, Elekta, the distributor of the film, licensed to the Eureka Productions, Inc., a New York corporation, to act as exclusive exhibitor of the film in the United States, for a period of five (5) years, until *1939*.

On April 27, 1936, Eureka, as *licensee*, in its own name, secured a Certificate of Copyright upon said film, which states as follows:

> "Directed by Gustav Machaty,
> Author of Photoplay of
> Czechoslovakia"
> (Plaintiff's Exhibit 12,
> fol. 929).

It may be said in passing, that since the Eureka Productions, Inc., was merely a *licensee*, and not an *author* or *proprietor* of the film, it was not qualified under *Section 9 of the Copyright Act* (formerly Section 8) to secure a copyright in its own right; and, therefore, Eureka predicated its application for copy-

right upon the authorship of Machaty; and in view thereof, it must be deemed that Eureka secured and held such copyright, *in trust,* for the benefit of Machaty, who is the author and producer of the film.

Thereafter, and in 1938, Elekta licensed to one Weingarten, the predecessor of the respondent Astra, the exclusive license for the showing of said film, for a period of five (5) years, when Eureka's license expired in 1939, *so that Astra's right to distribute the film expired in 1944.*

In 1940, in settlement of a suit between Eureka, on the one hand, and Weingarten and Wyngate, Inc., on the other, Eureka made a private agreement to assign to Weingarten and Wyngate all its rights, including *the copyrights,* to said film.

It may be said in passing that Weingarten took the assignment of said copyrights from Eureka *subject to the same trust.*

Thereafter and in 1947, the petitioner, Machaty, refused to recognize any claim of Astra in and to said film, and, thereupon, the petitioner, Machaty, as author and producer of said film, licensed Eureka (the former licensee of Elekta) to exhibit said film in this Country, and the petitioner, Machaty, thereupon, and in 1948 brought this suit to restrain the respondents from distributing said film, and for damages, after *1944,* when Astra's right to distribute said film expired, under its contract from Elekta; and for a *TRUST* to be declared in favor of Machaty upon said copyrights.

The trial Court dismissed the complaint, and the Court of Appeals affirmed the judgment, on the ground that after the rights of Astra to exhibit the

picture expired in *1944*, the copyrights to said film (which were taken out by Eureka in trust for Machaty), *reverted* to Elekta, the general *licensee* of the petitioner, Machaty, and not to the petitioner, Machaty, who is the author and producer of the film.

In 1947, Machaty recovered a judgment against Elekta, in Prague, *after a trial and upon the appearance of both sides by counsel* (Plaintiff's Exhibit 8 for Identification, fols. 736-790).

The judgment in Prague, therefore, is conclusive upon the merits; and the Elekta will not be permitted, in our courts, to re-examine the questions of law and fact, which were settled by Prague judgment.

Dunstan v. *Higgins,* 138 N. Y. 70.

The ruling in the case of *Dunstan* v. *Higgins* (*supra*), has been reaffirmed by the following cases:

Johnston v. *Compagnie General Transatlantique,* 242 N. Y. 38;
Gilbert v. *Burnstine,* 255 N. Y. 348.

Thereafter and on or about August 6, 1948, Gustav Machaty commenced an action against Elekta-Film and Joseph Auerbach by the service of the summons and complaint upon each of them, in the Supreme Court, New York County (Plaintiff's Exhibit 9 for Identification, fol. 830).

The complaint in said action is predicated upon the following two grounds:

(1) Upon the two contracts between Gustav Machaty and Elekta-Film, dated July 12, 1932, and September 17, 1932, as aforesaid.

(2) Upon the said foreign judgment recovered by Gustav Machaty against Elekta-Film, in Prague, Czechoslovakia (Plaintiff's Exhibit 9 for Identification, fols. 805-807).

The defendant Elekta-Film moved to set aside the service of the summons and complaint upon it, upon the ground that it was a foreign corporation and was not doing business in New York State. Its motion was denied by the Supreme Court, New York County, and said denial was thereafter unanimously affirmed by the New York Appellate Division of the First Department (fols. 830-836).

Upon the denial of the motion, no answer was thereafter interposed by said Elekta-Film, and judgment was thereupon entered in the Supreme Court, New York County, on September 14, 1950, in favor of Gustav Machaty and against Elekta-Film; and the material portion of which judgment reads as follows:

> "ORDERED, ADJUDGED AND DECREED, that plaintiff (*i. e.,* Gustav Machaty) is entitled to judgment against the defendant corporation Elekta-Film, A. G., *as prayed* for in the complaint herein" (Plaintiff's Exhibit 9 for Identification, fols. 793-799).

THE PRINCIPAL QUESTIONS PRESENTED ARE:

1. Was the Court of Appeals right in holding that the copyrights (which were taken in *trust* by Eureka and assigned by Eureka to Astra), had reverted to Elekta, the *general licensee* of the film, and not to the petitioner, Machaty, who is the *author* and *producer* of the film.

2. Was the Court of Appeals right in holding that the judgment of the Supreme Court, New York County, did not constitute *res adjudicata* against Elekta-Film.

Reasons for Granting the Writ.

The outline of the case and of the questions presented show that this case falls within more than one of the classes described in Paragraph 5 of Rule 38 of the Rules of this Court as appropriate for certiorari.

None of the points raised herein involve any conflict in the evidence. Only questions of law are presented on facts found or clearly established.

Respectfully submitted,

Henry Pearlman,
Counsel for Petitioner,
Office & P. O. Address,
1440 Broadway,
Borough of Manhattan,
City of New York.

June 23, 1952.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. .

GUSTAV MACHATY,

Petitioner,

—against—

ASTRA PICTURES, INC., MICHAEL M. WYNGATE, INC., MARTIN LICHT,

Respondents.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The District Court rendered a written opinion (fols. 1897-1908) and is reported in —— Fed. Supp. ——. The opinion of the Court of Appeals (R. 663) is reported in —— F. (2d) ——.

Jurisdiction.

The judgment of the Court of Appeals (R. 679) was entered on the 28th day of March, 1952. Jurisdiction to issue the writ rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

The pertinent portion of Section 9 of the Copyright Act (formerly Section 8), (17 U. S. C. A. 9), provides:

> "Section 9. AUTHORS OR PROPRIETORS, ENTITLED; ALIENS
>
> The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title:"

ARGUMENT.

I.

The trust impressed upon the copyrights was in favor of Machaty and not Elekta, and reverted to Machaty.

The District Court found that plaintiff Machaty "is the producer and author" of the motion picture (fol. 1898); and the Court of Appeals similarly found that plaintiff Machaty "wrote, directed and produced" said motion picture (R. 664).

There is no provision in said contract of July 12, 1932, that Machaty assigns, transfers or grants to Elekta any proprietary interest whatsoever in the manuscript, authorship or production of the film, or in and to any part of the literary property to said motion picture.

Since the right of Machaty to the literary property of said film was not assigned to Elekta, it follows that Machaty remained the owner of said literary property.

In *Saake* v. *Lederer,* 174 Fed. 135 (Third Circuit), the Court said at page 137:

> "It is therefore obvious that this contract, on which Lederer's sole right to procure a copyright rests, neither conveyed nor purported to convey the author's title or right to a copyright in the United States."

Section 9 of the Copyright Act (formerly Section 8) provides:

> "The *author or proprietor* of any work made the subject of copyright by his title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: . . ."

It is well settled that "proprietor", means the same as "assigns".

In *Egner* v. *E. C. Schrimer,* 139 F. (2d) 398 (First Circuit, 1943), the Court said at page 399:

> "Under the Copyright Act, 17 U. S. C. A. Section 8, the persons who may have copyright are 'the author or proprietor . . . or his executors, administrators, or assigns.' '*Proprietor*' means the same as 'assigns'. . . . *Mifflin* v. *R. H. White Co.*, 190 U. S. 260; *Public Ledger* v. *New York Times*, 275 F. 562, affirmed 279 F. 747, certiorari denied 258 U. S. 627. By the trial court's findings Egner and Mayer were licensees with permission to publish the song in their compilation.

> "*As such licensees and not assigns they were not proprietors and, therefore, could not copyright the individual 'Caisson Song' when they copyrighted their compilation. Public Ledger Co. v. Post Printing & Publishing Co. v. New York Times, supra*; *Saake v. Lederer*, 174 F. 135; *Fraser v. Yack*, 116 F. 285; see *American Press Association v. Daily Story Publishing Co.*, 120 F. 766."

It follows that the Copyright Act grants the exclusive right of copyright to two distinct kinds of persons, only, namely:

(a) To the AUTHOR of a work.

(b) To the PROPRIETOR of a work; and by PROPRIETOR, as shown above, means a purchaser or grantee of the literary property from the AUTHOR.

Elekta was not a purchaser, assignee or transferee of the literary property of said film from the AUTHOR Machaty; but was only an *agent* of the AUTHOR Machaty for the sale of the USE of the film, and, consequently, Elekta could not qualify as a PROPRIETOR under said *Section 9 of the Copyright Act*.

It follows that under *Section 9 of the Copyright Act*, Machaty, as AUTHOR, was entitled to secure a copyright for his work; whereas Elekta Film, as licensee from the author Machaty, was not entitled to copyright under said *Section 9 of the Copyright Act*.

It is well settled that where a person who is not the author of a work, secures a copyright in his own name, he may be deemed to hold such copyright in trust for the rightful owner.

680, 682

Cohan v. *Richmond*, 86 F. (2d) 680
(Second Circuit);
Eisel v. *Ladner*, 1 F. (2d) 436 (Third Ci Circuit).

ta emerge

The question then arises: How could Elekta ekta never as the copyright owner of the film, when Elekta came the was the author of the film, and never becan nder the proprietor thereof, and was not qualified und Copyright Act to secure a copyright?

te of the

The Courts, in furtherance of said Statute e that a Copyright Act, have developed the doctrine copyright may be *impressed with a trust.*

, it must

In developing the said equitable doctrine, it doctrine be assumed that the Courts approached said d ons mentioned under *Sections 1 and 9 of said Copyrig ight Act.* in the light of the language used and person

The question is: In whose favor may such t trust be impressed?

essed in

Was it intended that such trust be impres to secure favor of *Machaty*, the author, who is entitled to copyright under the Copyright Act; or, was it intended that such trust may be impressed in fa favor of *Elekta, not a proprietor* of said film, but mer erely an agent to sell the *USE* of the film to exhibitors s?

ants the

Since the Statute of the Copyright Act gra right of copyright to an *author or proprietor*, it must follow that the copyright taken out by a licensee of Elekta was intended to be impressed with a trust in favor of the *author or proprietor only.*

In *Hanson* v. *Jaccard Jewelry Co.*, 32 F. 202, the Court in construing said Statute, said that the Statute permits the taking out of a copyright in the name of a trustee for the benefit of some third party who is the "author or proprietor".

In 1936, Eureka Productions, Inc., as licensee, secured a Certificate of Copyright upon said film, which sets forth as follows:

> "Eureka Productions, Inc.,
> 410 East 32nd St., New York, N. Y.
>
> Title, Ecstacy, Dialogue by Jacques A. Koerpel, Edited by Jack Kempt.
>
> *Directed by Gustav Machaty, Author of Photoplay of Czechoslovakia (8 reels)"*
>
> (Plaintiff's Exhibit 12, fols. 929-930).

Eureka, therefore, in applying for the copyright expressly states that it predicates its application for copyright upon the authorship of Machaty and thereby impliedly conveys and represents that it will hold such copyright in trust for the author Machaty.

The Court of Appeals says, that "If Elekta is still in control of the world-wide distribution rights, then the equitable interest in copyrights, taken out by its assignees *reverts* to *Elekta* and not Machaty" (R. 669).

When we say that a right reverts, we mean that the person who originally granted the right was entitled to its return.

Since Elekta was neither author, nor proprietor, and was not qualified to secure a copyright, then the

copyright secured by Eureka must be deemed to have been taken out in trust for Machaty, as the author and proprietor; and when the license of Astra terminated in 1944, then the copyright must be deemed to have *reverted* to Machaty, who was qualified to take out a copyright, and not to Elekta, who was, at no time, qualified to take out such copyright.

Machaty had a right to bring this action for the protection of his rights.

So when the rights of Astra expired in 1944, Machaty had the right to bring suit against Astra as an interloper, if Elekta did not see fit to intervene for the protection of Machaty's literary property.

In conclusion, the reason why the copyright *reverted* to Machaty, and not to Elekta, are as follows:

(1) That under the Copyright Act Machaty as the author was qualified to apply for a copyright of his work.

(2) That Elekta was neither an author nor proprietor, but merely a distributor of said work, and that as distributor Astra was not granted the right under the Copyright Act to apply for a Copyright of another party's work.

(3) That thereafter, and in 1936, Eureka, a licensee of Elekta, applied for a copyright to said literary property of Machaty, upon the express and specific ground that Machaty was the "AUTHOR" of the photoplay (fol. 930), and that thereby Eureka represented that it took out said copyright *IN TRUST* for the *AUTHOR* Machaty.

(4) That the Courts have held that when a copyright is permitted to be taken out in trust for a third party, it means in trust for the AUTHOR or PROPRIETOR of the work; and, in the instant case, it means *in trust* for Machaty, the author; and not in trust for Elekta, which is merely the distributor of said film.

(5) That, consequently, when the time of Astra to distribute the film terminated, in 1944, the *copyright* which was taken out for the benefit of the author Machaty, therefore, reverted to the author Machaty and the *distribution rights* which were secured by Astra from Elekta, the *Distributor*, therefore, reverted to Elekta.

II.

The judgment of the Supreme Court, New York County, in favor of the petitioner Gustav Machaty and against the Elekta-Film constituted a *res judicata* determination as against Elekta, and was binding on the United States District Court and United States Court of Appeals and hence the copyright was vested in Machaty.

The contract between Machaty and Elekta, dated July 12, 1932, granted to Elekta a contract for the distribution of said film throughout the world (Plaintiff's Exhibit 2, fol. 682).

In 1934, Elekta gave a license to Eureka to distribute and exhibit the film for the territory of the United States for a period of five years (Plaintiff's Exhibit 10, fol. 895).

On December 20, 1938, Elekta gave to Weingarten a license to distribute and exhibit the film, for the territory of the United States, for a period of five years, commencing with the expiration of the agreement between Elekta and Eureka, which agreement expired in *1944* (Plaintiff's Exhibit 4, fol. 700).

Weingarten assigned the license to Michael M. Wyngate, Inc. (Plaintiff's Exhibit 5, fols. 706-717), and Wyngate thereafter assigned the license to Astra (Plaintiff's Exhibits 6 and 7, fols. 718-735).

On or about *August 6, 1948*, Gustav Machaty commenced an action against *Elekta-Film and Joseph Auerbach* by the service of the summons and complaint upon each of them, *in the Supreme Court, New York County* (Plaintiff's Exhibit 9 for Identification, fol. 830).

The complaint in said New York Supreme Court action is predicated upon the following two grounds:

(1) Upon the said two contracts between Gustav Machaty and Elekta-Film, dated July 12, 1932, and *September 17, 1932*, as aforesaid.

(2) Upon the said foreign judgment recovered by Gustav Machaty against Elekta-Film, in Prague, Czechoslovakia (Plaintiff's Exhibit 9 for Identification, fols. 805-807).

The defendant Elekta-Film moved to set aside the service of the summons and complaint upon it, upon the ground that it was a foreign corporation and was not doing business in this State. Its motion was denied by the Supreme Court, and said denial was thereafter unanimously affirmed by the Appellate Division of the First Department (fols. 830-836); 277 App. Div. 981.

After the denial of said motion, no answer was thereafter interposed by said Elekta-Film, and judgment was thereupon entered on *September 14, 1950,* in favor of Gustav Machaty and against Elekta-Film; and the material portion of which judgment reads as follows:

> "ORDERED, ADJUDGED AND DECREED, that plaintiff (*i. e.,* Gustav Machaty) is entitled to judgment against the defendant corporation Elekta-Film, A. G., as prayed for in the complaint herein" (Plaintiff's Exhibit 9 for Identification, fols. 793-799).

The Court of Appeals has decided that the copyright taken out by Eureka, as sub-licensee of Elekta, was impressed with a trust (as claimed by Machaty), in trust for him; but (as decided by the Court of Appeals), was impressed with a trust, in favor of Elekta (R. 669; 675).

Said Court has further decided that Astra, as assignee of Weingarten, "took those copyrights from Eureka subject to the same trust" (R. 675).

Said Court has further decided that "Astra's license terminated in *1944*" (Opinion, p. 905, ll. 1-3); and that Astra "had valid rights in the film until *1944 only,* as a licensee of Elekta" (R. 677; 670).

Said Court has further decided that, "If Elekta is still in control of these rights, then the equitable interest in copyrights, taken out by its assignees, reverts to Elekta and not Machaty" (R. 669).

It follows, from the foregoing determinations of said Court, that, *after 1944,* **Astra had no further** right or interest whatsoever in and to said film, either as licensee or copyright holder or otherwise.

It further follows that, *after 1944,* when Astra's right to said film terminated, Astra had no right to interfere with the right of Machaty under said contract of July 12, 1932, between Machaty and Elekta; and that any such interference on the part of Astra, *after 1944,* must be construed as that of an interloper, intruder and wrongdoer.

After Astra's rights, as licensee, had *terminated in 1944,* Machaty, on or about August 6, 1948, commenced the said action in the Supreme Court, New York County, against Elekta Film (fol. 830); and judgment was entered against Elekta-Film on *September 14, 1950* (Plaintiff's Exhibit 9 for Identification, fols. 793-799).

The judgment as entered in the Supreme Court, as indicated above, is that Machaty "is entitled to judgment against the defendant corporation Elekta-Film, A. G., *as prayed for in the Complaint"* (Plaintiff's Exhibit 9 for Identification, fols. 793-799).

The material provisions of the *prayer* of the complaint, in the Supreme Court Action of *Machaty* v. *Elekta,* reads as follows:

> "WHEREFORE, plaintiff demands judgment against the defendants as follows:
>
> (1) That it be adjudged that the plaintiff and defendant Elekta-Film, A. G., entered into the said agreements, dated July 12, 1932, and the said subsequent modification agreement, dated September 17, 1932.

(2) That it be adjudged that the rights of the defendant Elekta-Film, A. G., under said agreement of July 12, 1932 and September 17, 1932, to distribute or exploit said film, came to end, expired and terminated on July 12, 1937.

(3) . . .

(4) . . .

(5) . . .

(6) That it be adjudged that the plaintiff exclusively owns all of the distribution, exploitation and exhibition rights in and to the aforementioned motion picture production, entitled 'Ecstacy'.

(7) . . .

(8) That it be further adjudged that the acts and conduct of the defendants in distributing, exhibiting, licensing, or otherwise exploiting said film, after the expiration of said agreements, on July 12, 1937, was wrongful and unlawful and violated and infringed upon the exclusive property rights of the plaintiff in and to said film; and that the defendants account to plaintiff for the proceeds realized since July 12, 1937 and until the entry of judgment herein, by reason of said tortious acts and unlawful exploitation of said film.

(9) . . .

(10) *That the defendants shall forthwith surrender, assign and deliver to plaintiff any registered Copyright Certificates issued by the United States, or any other Country, to the defendants, or either of them, in and to said motion picture production and its incidents and appurtenances''* (fols. 882-890).

It follows, therefore, that under subdivision 10 of the prayer of the complaint, the plaintiff has judgment against Elekta, that Elekta "*forthwith surrender, assign* and deliver" to Machaty all copyrights issued to defendant Elekta (Plaintiff's Exhibit 9 for Identification, fols. 793-799).

The Court of Appeals in construing the Supreme Court judgment and the Prague judgment said:

> "Both judgments decided that Machaty was the present owner of the distribution rights as against Elekta" (Opinion, p. 904, ll. 8-10).

In view of said Subdivision 10 of the prayer of the complaint in the Supreme Court Action, it follows that Machaty has also recovered judgment *to the copyrights secured by Elekta.*

It follows, that since the Supreme Court, New York County, has granted judgment in favor of the petitioner, Machaty, and against Elekta-Film, and thereby determined that the copyrights are vested in Machaty, that upon the termination of the license of Astra to distribute the picture in 1944, the rights to the copyright reverted to Machaty, and not to Elekta.

The Court of Appeals, therefore, erred in holding that the copyrights reverted to Elekta.

Respectfully submitted,

HENRY PEARLMAN,
Counsel for Petitioner.

June 23, 1952.

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OCTOBER TERM 1952

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GUSTAVE MACHATY,

Petitioner,

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ASTRA PICTURES INC., MICHAEL M. WYNGATE INC., MARTIN LICHT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN A. ALBERT,
Counsel for Respondents,
170 Broadway,
New York City.

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IN THE

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No. 161

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Petitioner,

against

ASTRA PICTURES INC., MICHAEL M. WYNGATE L[illegible], MARTIN LICHT,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITIO[illegible] TO PETITION FOR WRIT OF CERTIORAR[illegible]

Statement of the Case

In petitioner's "Outline of the Case and Questi[illegible] Pre-sented" he would make it appear in the first and[illegible] cond paragraphs thereof (Pet. p. 2) and subsequent di[illegible]ssion (unsupported by citations from the record) that p[illegible]ioner had produced a completed motion picture and th[illegible] after entered into a distribution contract with Elekt[illegible] Film. This is diametrically opposed to the actual facts here-inafter shown.

(Machaty was the producer of the film only in t[illegible] sense that he directed its production and was in charge[illegible] was the head of production; the film was produced b[illegible]lekta Film in the same way that Paramount Films pr[illegible]es a picture, giving credit as producer to the man in [illegible]rge.)

In July, 1932 (682) * Elekta Film agreed to "manufacture" the motion picture Ecstasy according to the plan of the petitioner. (In less stilted translation—produce under the direction of Machaty.) Petitioner guaranteed that the picture would not cost more than 745,000 crowns (683) and agreed to deposit 150,000 crowns against production costs exceeding this amount (684). The 150,000 crowns were never paid by petitioner (1899). It cost Elekta 2,500,000 crowns to produce the picture which was never recouped (529). Elekta was granted the unlimited right to sell in foreign countries (686; p. 669) and Elekta was to own the negative and all rights until its production costs had been recouped (688).

The picture was completed on the basis of this agreement and first shown in Prague in 1933 (64).

In 1934 Elekta granted to Eureka Productions Inc. an exclusive distribution contract for the U. S. (Pl. Ex. 10; 895-923, 96) and Eureka copyrighted the picture with the consent of one Auerbach, president of Elekta (542) of all of which petitioner had knowledge and consented to. This is clear from the record despite his denials: he must have been told of this deal (1283, 1285, 1770, 1774) he made changes in the picture to make it palatable for American consumption (523, 534) he expected the picture to be copyrighted in whatever country shown (1355) authorized Elekta to permit copyright (1382) in fact had no interest in such legalities (1157).

In 1938 Elekta gave the American distribution rights to one Weingarten effective on the termination of the Eureka deal (Pl. Ex. 4; 700-705) who assigned the same to Wyngate. In 1940 they sued Eureka for infringement in continuing to distribute Ecstasy and obtained a judgment (1870) enjoining Eureka and one Cummins from in any manner dealing in Ecstasy which judgment determined that Wyngate and Weingarten owned all rights in the picture (1869). This judgment was thereafter settled by

* Unless otherwise noted references are to folios of record.

Eureka assigning all of its rights in the picture and its copyrights to Weingarten and Wyngate (1809-1818) and *covenanting to obey the injunction unconditionally* (1821).

In 1942 respondent Astra succeeded to the rights by assignment and became the title owner of the copyrights (718-727).

Machaty came to this country in 1936. He claimed that he never saw the picture between then and 1947 (248). Pursuant to agreement dated August 15, 1947 he licensed (941) none other than Eureka and Cummins to exhibit Ecstasy, being able to do so because he had smuggled into this country an old negative of Ecstasy (1217) from which prints for exhibition could be made (all other negatives and prints being in the possession of Astra).

Such new abortive license (941) by its language shows a consciousness of lack of belief that Machaty had enforceable rights and an intent on the part of Eureka and Cummins to evade the New York injunction and previous covenant not to infringe by setting up a colorable agreement. In fact such agreement dated August 1947 makes reference to the now abandoned Czech judgment which is dated September 1947 (786). Such consciousness is further clear from the following: Machaty told the incredible story that when he made this agreement with Cummins he was never told that Eureka owned the copyright (1178); the New York judgment and its implications were never discussed, though they had a copy of the record (1183), he was never told Cummins was under injunction (1184), the problem of obtaining prints for exhibition was never discussed (1184) although Cummins said he had none (1720).

Machaty's awareness of the fact that his conduct was that of a man who did not believe he had any rights in the picture, and his attempt to anticipate and negative proof thereon is clear from his testimony. To show why he did nothing about the picture for 10 years he originally testified he never saw the picture from 1937 to 1947 (248), didn't know it was shown in this country (1176), never saw the

picture (1222), but then was forced to admit that he had seen the picture in Los Angeles in 1937 (246, 1364) but was so disinterested in his rights that he didn't inquire into who was distributing it (1341). And in 1942 he sueed everybody for infringement (1017) and then discontinueed the action and gave a general release to Auerbach for $4000 (1078, 1090).

Although no testimony was offered by petitioner to show that Elekta had recouped its production costs, he attempted to clear one hurdle by a barefaced statement, unsupported by other proof that he had paid the 150,000 crown guarantee required by the contract (684). On this first requirement for the ripening of any right he told many different stories: he made the payment in full (54) after the making of the July 12th agreement (55) on July 12 (203), 80,000 crowns on July 12, 70,000 crowns later (204, 1589-1616); he didn't remember if it had been paid (205); the entire amount was paid at once (207); it was not paid in full (211); doesn't know (1159-1160); paid all in cash on July 12th (1372). Auerbach testified the 150,000 crowns had never been paid (526). The Court was clearly correct in refusing to give any credence to this claim of payment (1899). Finally on the appeal below petitioner for the first time urged that this payment had been waived.

Petitioner's main claim was bottomed upon an alleged instrument dated September, 1932 (Pl. Ex. 20, p. 355), the original of which has never been produced in any litigation. Machaty claimed this instrument modified the July 12th agreement and terminated Elekta's rights in 1937. As to the existence and genesis of this agreement Machaty also told many conflicting stories: the original was on file in a Czech court in Prague (135); he didn't know where it was (152-157, 1106); it was not on file in the Czech court (1138); he never said the original was not on file (152); a copy of the original was on file (1240); he never had the original in his possession (1632); the Czech file contained a copy made by his Czech lawyer (1235). A mere reading of the alleged agreement (p. 355) indicates there was no

consideration whatsoever or even reason for Elekta to have circumscribed its rights. Auerbach testified he never signed such an agreement (528, 529).

Petitioner attempted to account for the production of a copy rather than the original and again told many different stories: he took the copy with him when he left Czechoslovakia in 1936 but wasn't sure (214, 1523, 1554); he did take it with him (221); he didn't make a copy (229); the copy was made by his lawyer (1235); the instrument produced was a copy, made by a friend, of a copy made in Czechoslovakia (1115-1118, 1241, 1690). That the Court correctly refused to credit the existence of this alleged agreement or the competency of the copy is clear (1904, p. 667).

Machaty's credibility was shattered on many other minor points. The above summary of the record exposes the reason why petitioner has failed to advert thereto and the Court's reference (p. 666) to the man who flung himself upon his horse and rode madly off in all directions.

Being unable to establish any case upon the facts, petitioner now urges solely legal concepts having no application to the above facts, that respondents hold the rights in Ecstasy in trust for Machaty; that a New York judgment for accounting against only Elekta is res adjudicata and determinative of Astra's rights.

POINT I

Machaty failed to prove he had any rights in Ecstasy.

Solely on ad hominem argument, with an understandable failure to advert to the record, petitioner contends that since the copyrights legally in the name of respondent are held in trust which was decided in the companion case of *Astra* v. *Eureka, et al.* (this Calendar #162), they must be held in trust for Machaty. But such decision was in the other case and a determination of the rights of

Astra vis-a-vis *Eureka, et al.* (p. 670). The pronouncement in that case of the existence of a trust has no bearing on this case in which the Court determined that Machaty had no rights in the picture (p. 664) sufficient to even invoke any trust doctrine.

This is clear from the record which petitioner ignores. The proven contract between Elekta and Machaty gives Elekta all rights until production costs are recouped (688). Elekta spent 2,500,000 crowns which were never recouped (529, p. 665) Elekta, apart from any obligation to account, therefore still has all rights in the picture as against Machaty.

That such rights may be and properly were assigned by Machaty to Elekta is clear from the agreement of July 12; the right to obtain a copyright and permit Eureka to do so at all times was vested in Elekta.

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284.

Houghton Mifflin Co. v. *Stackpole Sons,* 104 F. 2nd 306.

Callaghan v. *Meyer,* 128 U. S. 617.

Gerlach-Barklow Co. v. *Morris & Benshen,* 23 Fed. 2nd, 159.

31 Corpus Juris, Sec. 270.

Uproar v. *National Broadcasting Co.,* 81 Fed. 2nd, 373.

Machaty knew copyrights were to be taken out by Elekta, had been taken out by Eureka, consented thereto, ratified the same by his conduct, actually had not interest therein and was guilty of gross laches. His trusted friend informed him of all contracts and certainly must have told him about the unanticipated American deal (1285, 1770, 1774, 1287, 1283). Auerbach testified without contradiction Machaty personally aided in making changes in the picture to make it suitable for American consumption (532-534). Machaty admitted he knew the picture would be copyrighted wherever

shown (1355). He fully authorized Elekta to permit others to copyright it (1382) and had no interest in it (1223, 1157, 1340, 1341).

That petitioner has no present rights in the picture is clear. That the copyright is valid by long acquiescence (*Fitch* v. *Shubert*, 20 F. S. 314) and that petitioner in any event is guilty of such laches as to clearly establish that he had abandoned any claims that he may have had, is patent from all of the foregoing facts and his own pithy pronouncement (1343) and the applicable authorities.

Holmberg v. *Arnbrecht*, 327 U. S. 392.
Witkey v. *S. T. McKnight*, 87 Fed. 2d, 916.
Crites v. *Radtke*, 19 Fed. Supp. 238.
Fretwell v. *Gillette*, 106 Fed. 2nd, 728.
Isaac v. *Milton Mfg. Co.*, 33 Fed. Supp. 732.
Weigand v. *Trent*, 122 Fed. 2nd, 921.
Egner v. *Schirmer Co.*, 48 Fed. Supp. 187.
Davella v. *Harms*, 36 Fed. Supp. 843.

Elekta's production costs never having been recouped, Machaty never having paid the 150,000 crown guarantee, it is clear that petitioner never established any rights to the picture. *Pulte* v. *Derby*, 5 *McLean* 328; Fed. Cases #11465. In all events any such rights were abandoned or lost by laches.

POINT II

The judgment of the New York Court was properly excluded.

Petitioner relies on only one other point—a judgment in the Supreme Court of the State of New York obtained against Elekta for an accounting (794). Such default judgment was properly excluded as wholly irrelevant to the issues at bar (p. 668) since respondent could not be deprived of the defenses which it had against petitioner (Point I, supra) not available to or urged by Elekta. That

Elekta had to account to Machaty, and was sued therefor and a judgment obtained was not a determination with respect to ownership and copyright rights. *Leo Feist, Inc.* v. *Song Parodies,* 146 Fed. 2nd 400. Since Astra was not a party to the suit and had other defenses available to it, such judgment was not binding on it. *Cromwell* v. *Sac County,* 94 U. S. 351; *Boynton* v. *Moffatt,* 57 Fed. 2nd 772 and finally the judgment is in no way binding on a federal court since a state court has no jurisdiction to determine the validity or infringement of a copyright, the issue at bar. *Condon* v. *Associated Hospital Service,* 287 N. Y. 411; *Underhill* v. *Schenck,* 238 N. Y. 7.

POINT III

The petitioner has not shown a right to the writ.

Petitioner blithely states, without even supporting argument, that "this case falls within more than one of the classes described in paragraph 5 of Rule 38 of the Rules of this Court as appropriate for certiorari" (Petition, p. 6).

It falls within none.

The Court of Appeals affirmed the District Court and the District Court upheld respondent's contentions on all issues of fact which had to be first determined before applying any legal concepts which might bottom petitioner's rights.

There are no constitutional or important legal questions requiring decision of this Court; the decision is not in conflict with that of any other Circuit, or of this Court; the questions presented are not novel.

No sufficient reason has been shown to warrant the granting of the writ.

Since petitioner concedes there is no issue of fact, there is not even necessity for the exercise of this Court's supervision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MELVIN A. ALBERT,
Counsel for Respondents.